FILED
MAR 2 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 326

LEWIS LLOYD ANDERSON,

Petitioner,

—v.—

STATE OF ALABAMA,

Respondent.

PETITIONER'S BRIEF

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INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement	2
Summary of Argument	8
Argument	8
Conclusion	14
Appendix	15

CITATIONS:

Cases:

Avery v. Georgia, 345 U.S. 559	13
Cassell v. Texas, 339 U.S. 282	11, 12, 13
Eubanks v. Louisiana, 356 U.S. 584	12, 13, 14
Fikes v. State, 263 Ala. 89, 81 So. 2d 303, reversed, 352 U.S. 191	6, 8, 11
Hernandez v. Texas, 347 U.S. 475	13
Hill v. Texas, 316 U.S. 400	9, 11
Neal v. Delaware, 103 U.S. 370	9, 13
Pierre v. Louisiana, 306 U.S. 354	9
Reece v. Georgia, 350 U.S. 85	9, 13
Shepherd v. Florida, 341 U.S. 50	11
Smith v. Texas, 311 U.S. 128	9, 13
Strauder v. West Virginia, 100 U.S. 303	12 13

PAGE

Statutes:

28 U.S.C. §1257(3) 1
Tit. 30 Ala. Code of 1940, §3 as amended 4, 15
Tit. 30 Ala. Code of 1940, §18 as amended 10, 15
Tit. 30 Ala. Code of 1940, §20 as amended 10, 16
Tit. 30 Ala. Code of 1940, §21 as amended 10, 17

Miscellaneous:

Ala. Rep. Atty. Gen. 1936-38, p. 355 10

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The opinion of the Alabama Court of Appeals is reported in 120 So. 2d 397. The opinion of the Supreme Court of Alabama is reported in 120 So. 2d 414.

Jurisdiction

The judgment of the Alabama Court of Appeals was entered on November 10, 1959. R. 64-91. A petition to the Supreme Court of Alabama for writ of Certiorari was denied on March 17, 1960, R. 99, and application to the Supreme Court of Alabama for rehearing was overruled on May 19, 1960, R. 100. The jurisdiction of this Court is invoked pursuant to 28 United States Code, Section 1257(3), petitioner having asserted below, and asserting here, the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States.

Question Presented

Whether the practice of the Dallas County, Alabama, Jury Commission in preparing the jury roll, according to which no Negro has ever served on a petit jury and only one has ever served on a grand jury, constitutes such arbitrary and systematic exclusion of Negroes as to have denied petitioner the equal protection of the laws secured by the Fourteenth Amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

This case involves:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Title 30, Alabama Code of 1940, Sections 3, 18, 20 and 21. These statutory provisions are set forth in the Appendix, *infra*, p. 15.

Statement

The judgment of the Alabama Court of Appeals, Second Division, entered in this case on November 10, 1959, affirmed a judgment and sentence of the Circuit Court of the Fourth Judicial Circuit in and for Dallas County, Alabama, adjudging the petitioner guilty of first degree manslaughter, and sentencing the petitioner to ten years' imprisonment (R. 8-9).

Execution and enforcement of the judgment of the Alabama Court of Appeals was stayed on May 27, 1960, by Presiding Judge of the Alabama Court of Appeals Robert G. Harwood, "for 90 days from the 19th day of May 1960, to enable appellant (petitioner) herein, to apply for and

obtain, if he can, a review of said cause by the Supreme Court of the United States, . . ."

The circumstances leading up to this judgment are as follows:

The petitioner, a Negro minister, owned a 1956 Black Lincoln Premier (fols. 96, 113, 121, 155). On January 20, 1959, while driving along a street in Selma, Alabama, he struck and killed one Tom Reese. As a result, he was indicted by a Dallas County grand jury for Murder in the 2nd degree, which true bill included the lesser charges of voluntary and involuntary manslaughter. The petitioner entered a plea of not guilty (fol. 3).

No Negro has ever served on a petit jury in Dallas County, and only one Negro reportedly ever served on a Dallas County grand jury. For this reason, petitioner, prior to trial on the merits, filed a motion to quash the indictment on the ground that Negroes were systematically excluded from the grand jury service in Dallas County solely because of their race and color. The motion included allegations that no Negro had served on the grand jury which had indicted him although Negro males qualified under the state law to serve outnumbered qualified whites. Petitioner declared that the methods followed by the Jury Commission of Dallas County in selecting the names of Negroes to be placed on the jury roll was highly irregular, arbitrary and contrary to the method prescribed by the laws of the State of Alabama and the Constitution of the United States (R. 2-4). Petitioner also filed a motion to quash the venire (R. 5-6), and later filed a motion to declare void the composition of the jury sworn to try the defendant, both on the constitutional allegations of systematic exclusion of Negroes from jury service (R. 7-8).

To prove racial discrimination, the petitioner introduced the 1950 Federal Census reporting 6,940 male whites over twenty-one years of age in Dallas County, Alabama, and

7,956 male Negroes over twenty-one years of age in Dallas County (R. 44-45). The Solicitor for the Fourth Judicial Circuit which includes Dallas County, admitted that since he took office in 1954, no Negroes have served on the grand juries which are organized twice a year (R. 12-13). The Solicitor also testified that each venire contains about 70 names, that an average of six or seven of these are Negroes, and that while some of these ask to be excused, names of the others are placed in the hat from which the grand jury is drawn (R. 13-15). He reported (R. 14-16) that to his knowledge there were five Negroes on the venire drawn for the trial of this case, two were excused for illness, one claimed an over age exemption, and two remained on the venire. No Negro served on the grand jury in this case.

Two other court officials admitted that they could not recall any Negroes having served on a grand jury, while a third, a Deputy Circuit Solicitor, could recall only one Negro whom he believed had served on a grand jury in 1954 (R. 18). The Circuit Clerk, who served from 1950 to 1953 as secretary to the Jury Commission, could not recall any Negroes ever serving on grand juries. She maintained, however, that there was no racial identification on the jury cards (R. 15-16).

Five Negroes who were long-time residents of Dallas County and eligible for jury service, reported that they had never served on any jury and knew of no Negroes who had performed jury service (R. 20-23, 28-32, 37-42). One man held an M.A. degree, Phi Beta Kappa membership, and had lived in Dallas County for 65 years. On cross-examination, the State pointed out that this witness until the age of 60 had been a teacher and thus exempt from jury service (R. 21-22).[1] The Chairman of the Dallas County

[1] Among the classes of persons exempt from jury service under Alabama law unless by their own consent are: "teachers while actually engaged in teaching;" Tit. 30 Ala. Code of 1940, §3 as amended.

Jury Commission reported that the Commission followed a policy of not placing the names of exempt persons on the jury roll (R. 51-52), but petitioner introduced the jury list for the February 23, 1959 term of court, which list contained the name of one "W. David Holladay, Preacher and Teacher" who had been called for the present session of the court (R. 24). The record indicates that Mr. Holladay was white. The Jury Commissioner admitted as much, but explained that the white preacher-teacher's name had been placed on the roll "by mistake" (R. 52).

The Jury Commission chairman, who had held his post since 1954, stated that he thought that there were 1800 names on the jury roll, but also admitted that only one out of twelve was a Negro (R. 34). He said that in obtaining names for the jury rolls, both Negro and white prospective jurors were interviewed, and that he relied on recommendations of citizens who were "high class folks in various parts of the County, . . . " (R. 35-36).

He reported that he talked to persons all over the county about prospective jurors; and that in those precincts where he didn't know the Negroes, he would "ask some good white man" who would suggest names (R. 51-53).

He also reported that of those persons he checked, the ratio between whites and colored who had been convicted of crime was "eight or ten to one in favor of the whites" (R. 51). The Sheriff of Dallas County also estimated that 85% of the arrests he made were Negroes, although he admitted that some were repeaters, and that he did not mean to indicate that 85% of the total Negro population were criminals (R. 48-50). There was no evidence concerning what proportion of the Negro population had been convicted of crime.

The State called a witness who reported serving on a grand jury in Dallas County during January 1954, at which time one Negro also served on the grand jury (R. 45-46).

After hearing the testimony and considering the evidence offered by petitioner and the state regarding the above motions, the trial court overruled them (R. 5, 7, 8). On appeal in the Alabama Court of Appeals this point was again urged and it was held that the petitioner failed to carry the burden of proving that there was any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excluded or limited the number of Negroes available for jury service in Dallas County, Alabama. (R. 91).

The Alabama Court of Appeals in determining that petitioner failed to prove that there was any scheme which excluded or limited the number of Negroes available for jury service in Dallas County, referred to the Supreme Court of Alabama's opinion in *Fikes* v. *State*, 263 Ala. 89, 81 So. 2d 303, reversed, 352 U. S. 191, "to call attention to the fact that the jury commission of Dallas County made up a new roll of jurors in October 1953, so that no exclusion before that date would have any relevancy here" (R. 70-71), and further considered that opinion for a finding as to the make up of the jury roll in October of 1953:

> ". . . The Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes, . . ." (R. 71).

The Alabama Court then concluded that except for the adding of names of men newly qualified, and the deletion of those who have died or become disqualified, as required annually by statute, the basic makeup of the jury roll would not be changed. (R. 71).

The federal question concerning the right to be indicted by a grand jury and tried by a petit jury from which members of the petitioner's race have not been arbitrarily and

systematically excluded because of their race or color was properly raised before the Alabama Court of Appeals and disposed of adversely to petitioner's contentions. This is demonstrated in the opinion of the Alabama Court of Appeals (R. 64-91) and is largely described by the following quotation:

> "We feel all and all in balance that Anderson has failed to carry the burden of proof that there is any scheme within the meaning of the equal protection clause of the Fourteenth Amendment which excludes or limits the number of Negroes available for jury service in Dallas County, Alabama" (R. 91).

The issue of racial discrimination in jury selection as prohibited by the equal protection clause was first raised prior to the trial at which time petitioner submitted motions to quash the indictment (R. 2-4), quash the venire (R. 5-6), and to declare void the composition of the jury as sworn (R. 7-8). The trial court overruled each of these motions (R. 5, 7, 8). Following the verdict, petitioner submitted a motion for a new trial (R. 9-11). Paragraphs 8, 10, 12, 13 and 14 of this motion alleged deprival of the equal protection of the laws as secured by the Fourteenth Amendment to the United States Constitution in that petitioner was indicted and tried by juries from which members of his race were arbitrarily and systematically excluded because of their race or color as set forth therein in some detail. This motion for a new trial was overruled and exception was made thereto (R. 11). A writ of certiorari by petitioner to the Supreme Court of Alabama (R. 93-96), specifically raising the jury discrimination point, was denied (R. 99), and his application for rehearing to the Supreme Court of Alabama (R. 100), was overruled (R. 100).

Summary of Argument

The grand and petit juries which indicted and convicted petitioner of first degree manslaughter were bodies from which members of the Negro race were arbitrarily and systematically excluded. Although a new jury roll was prepared in 1953 following a state court finding that Negroes theretofore had been barred, the new policy, during seven years of operation, has resulted in but one Negro ever serving on a grand jury and none on petit juries. In a county where there are 7,956 adult male Negroes and 6,940 adult male whites, where 1,800 names are on the jury roll, but only one of twelve is a Negro, the state's burden of rebutting the showing of discrimination has not been met by testimony that a high percentage of persons arrested are Negro, nor by showing that a small, fixed number of Negroes has been selected for each venire.

Argument

The testimony in this case shows that petitioner has made out and supported his charge of systematic exclusion of Negroes from jury service in Dallas County. No Negro has ever sat on a petit jury and only one Negro has served on a grand jury since 1953, when a new jury roll was prepared, allegedly without regard to race.[2]

There are almost 8,000 male Negroes over 21 years of age in Dallas County, many of whom must be presumed qualified for jury service. But no more than 150 of them are presently listed on the jury roll.[3] The venires drawn

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[2] The opinion in *Fikes* v. *Alabama*, 81 So. 2d 303, 309, confesses that prior to the preparation of the 1953 jury roll "There had been only a small number of Negroes on previous rolls. Probably they had been systematically left off such rolls on account of race."

[3] Testimony was given by five Negro residents of Dallas County including a minister, a mechanic, teacher and a businessman, each

in Dallas County generally contain at least 70 names, but jury commission personnel testified that the number of Negro names drawn for each venire varies between five and eight.

Petitioner submits that it was on just such a showing in *Reece* v. *Georgia*, 350 U. S. 85, 88, that this Court concluded:

> "This evidence, without more, is sufficient to make a strong showing of systematic exclusion. The sizable Negro population in the county, the fact that all-white juries had been serving for as long as witnesses could remember, and the selection on the jury list of a relatively few Negroes who would probably be disqualified for actual jury service all point to a discrimination 'ingenious or ingenuous.' Smith v. Texas, 311 U. S. 128."

There are similar statements in several other cases.[4] In each of these case, the Court held that, on such facts, a *prima facie* case of race discrimination was established which the state had the burden of rebutting.

In the *Reece* case, *supra*, a showing of no Negro service on the grand jury list caused the Court to conclude that "petitioner's motion stated and his evidence supported a *prima facie* constitutional claim." 350 U. S. at 88. In *Hill* v. *Texas*, 316 U. S. 400, no Negro service on the grand jury in a county with a high percentage of literate Negroes resulted in a finding that "we think petitioner made out a *prima facie* case, . . ." 316 U. S. at 404. In *Pierre* v.

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of whom was not only qualified for jury service, but by virtue of profession and activities, would most likely have heard of Negroes who had actually served. Each said that they had never served on any County Jury, nor had they known of any Negro who had served.

[4] *Hill* v. *Texas*, 316 U.S. 400, 401-403; *Pierre* v. *Louisiana*, 306 U.S. 354, 351; *Neal* v. *Delaware*, 103 U.S. 397.

Louisiana, 306 U. S. 354, 351, similar evidence by petitioner "created a strong *prima facie* showing that Negroes had been systematically excluded—because of race—from the grand jury and the venire from which it was selected."

The State totally failed to show that the long history of all white petit juries and, with one lone exception, all white grand juries in Dallas County was not the result of a policy and practice of the Jury Commission resulting in the systematic exclusion of Negroes from the jury roll.

The State statutes under which the Jury Commission functioned left little doubt as to their duty:

> "The clerk of the jury commission shall, under the direction of the jury commission obtain the names of every male citizen of the county over twenty-one . . ." Tit. 30, Section 18, Ala. Code of 1940, as amended.
>
> "The jury commission, . . . shall make in a well bound book a roll containing the name of every male citizen living in the County who possessed the qualifications herein prescribed . . ." Tit. 30, Sec. 20, Ala. Code of 1940 as amended.[5]
>
> "The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent and are esteemed in the community for their integrity, good character and sound judgment;" Tit. 30, Sec. 21, Ala. Code of 1940, as amended.

In the face of these clear statutory commands, and notwithstanding census figures showing almost 8,000 male Ne-

[5] Section 20 has the effect of requiring that the name of every male citizen possessing qualifications described to serve as a juror and not exempt by law from jury duty be placed on the jury roll and in the jury box each year. Rep. Atty. Gen., 1936-38, p. 355.

groes over 21 in Dallas County, the Chairman of the Jury Commission testified that there were around eighteen hundred names on the jury roll, of which number only one in twelve are non-white.[6] That the Jury Commission Chairman did not believe that most Negroes in Dallas County were qualified is clearly inferable both from the small number of Negroes on the Jury role, and from his testimony, particularly his admission that in those areas where he did not know any Negroes, he relied on the advice of "a good white man" in selecting names of Negro jurors. It is this form of discrimination which "can arise from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve," *Hill* v. *Texas, supra* at 404.

The State made much of the fact that on each venire drawn in Dallas County there are listed from five to eight Negroes, some of whom ask to be excused. The petitioner submits that the very uniformity of the Negro representation on the venire smacks of the form of "proportional representation" held invalid in *Cassell* v. *Texas,* 339 U. S. 282, 287; *Shepherd* v. *Florida,* 341 U. S. 50.

The State also elicited testimony from the Sheriff and other Dallas County law enforcement officers to the effect that a high percentage of the arrests made in the County were of Negroes. The Alabama Court of Appeals, without further evidence as to how many Negroes have been arrested, or how many Negroes have been excluded for this

[6] Compare with the opinion in *Fikes* v. *State,* 81 So. 2d 303, reporting that "the Commission put into the box and on the roll in October 1953 fifteen hundred names of which two hundred and fifty to three hundred were Negroes. . . ." The testimony here thus indicates that since 1953, not only have no additional names of Negroes been placed on the jury roll in Dallas County, but that from 100 to 150 names have been removed.

reason, interpreted the testimony as, in part, justifyi
the absence of Negroes on the County's juries. Howeve
such testimony falls far short of explaining why not ev
one Negro has ever served on a petit jury, and why on
one Negro has served on a grand jury.

The procedure employed here is quite similar to th
held invalid by this Court's ruling in *Cassell* v. *Texa*
supra. There Mr. Justice Reed found that it was not ha
to ascertain an individual's qualifications for jury servic
and that it was reasonable to assume that a large porti
of the Negroes of Dallas County had the statutory requi
ments for jury service. He held that it was the duty
the Commissioners to familiarize themselves fairly wi
the qualifications of the eligible jurors of the County wit
out regard to race or color.

In a long line of decisions since *Strauder* v. *West Vi*
ginia, 100 U. S. 303, this Court has reversed state crimin
convictions because of systematic exclusion of the defe
dant's race from grand and petit juries. See *Eubanks* v.
Louisiana, 358 U. S. 584, 585. As a result, many co
munities have sought to give the appearance of complian
without according the substance.

In the past, this Court has found in even the most i
genious of these schemes the same fatal defect prese
in the case here: the insufficiently explained reason as
why in a county where at least 53 per cent of the eligib
Negroes are potentially qualified for jury service, there
a steadily decreasing number of Negroes listed on t
jury roll, only a token number of whom have been list
on each venire, and only one of whom has served over
period of years.

Here, as with many other cases of jury discriminati
heard by this Court, the statutory scheme is not in its

unfair, and is capable of being carried out with no racial discrimination whatsoever; but as was the situation in *Smith* v. *Texas*, 311 U. S. 128, 131, "by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable."

Clearly, the Constitution entitles petitioner to more than the Jury Commissions' protestations of impartial selection of jurors in Dallas County. *Reece* v. *Georgia*, 350 U. S. 85; *Hernandez* v. *Texas*, 347 U. S. 475. As was said in *Smith* v. *Texas*, *supra* at 130, "The Fourteenth Amendment requires that equal protection to all must be given—not merely promised."

Therefore, the petitioner maintains that if they are to have meaning, his rights under the equal protection clause must not be limited to merely prohibiting jury officials from placing only the names of whites on the jury list, by statute, *Strauder* v. *West Virginia*, *supra*, or by policy, *Neal* v. *Delaware*, 103 U. S. 370; or placing Negroes' names on the list in such a manner as to make them easily identifiable, *Avery* v. *Georgia*, 345 U. S. 559; or limiting to one the number of Negroes on each grand jury, *Cassell* v. *Texas*, *supra*.

Rather, the Court must continue, as in the past, to examine the jury selection system as to its result. As was said in *Eubanks* v. *Louisiana*, 356 U. S. at 585, "Our only concern here is with the application of this established principle to the facts disclosed by the record now before us." An absolute blank in the number of Negroes selected for petit juries, and but one exception in a recorded history of Negro exclusion from grand juries, is hardly met by protestations of good faith and evidence of fixed token number of Negro veniremen each year.

Petitioner does not challenge the system of selecting jurors in Alabama as such, but as in *Eubanks, supra,* he does contend that as administered in Dallas County, it has resulted in a predictable handful of Negroes being chosen for each venire, all but one of whom, by reason of chance illness, or easily obtained excuse, has failed actually to serve.

Under such circumstances, it is clear that the decision of the Alabama Court of Appeals would sentence petitioner to imprisonment contrary to the equal protection clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

WHEREFORE, for the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Title 30, Alabama Code of 1940

§3. Persons exempt from jury duty.—The following persons are exempt from jury duty, unless by their own consent: Judges of the several courts; attorneys at law during the time they practice their profession; officers of the United States; officers of the executive department of the state government; sheriffs and their deputies; clerks of the courts and county commissioners; regularly licensed and practicing physicians; dentists; pharmacists; optometrists; teachers while actually engaged in teaching; actuaries while actually engaged in their profession; officers and regularly licensed engineers of any boat plying the waters of this state; passenger bus driver-operators, and driver-operators of motor vehicles hauling freight for hire under the supervision of the Alabama public service commission; railroad engineers, locomotive firemen, conductors, train dispatchers, bus dispatchers, railroad station agents, and telegraph operators, when actually in sole charge of an office; newspaper reporters while engaged in the discharge of their duties as such; regularly licensed embalmers while actually engaged in their profession; radio broadcasting engineers and announcers when engaged in the regular performance of their duties; the superintendents, physicians, and all regular employees of the Bryce hospital in Tuscaloosa county and the Searcy hospital in Mobile county; officers and enlisted men of the national guard and naval militia of Alabama, during their terms of service and convict and prison guards while engaged in the discharge of their duties as such.

§18. Duties of clerk.—The clerk of the jury commission shall, under the direction of the jury commission obtain the name of every male citizen of the county over twenty-one

and under sixty-five years of age and their occupation, pl
of residence and place of business, and shall perform
such other duties required of him by law under the dir
tion of the jury commission.

§20. Jury roll and cards.—The jury commission sh
meet in the court house at the county seat of the seve
counties annually, between the first day of August and
twentieth day of December, and shall make in a well bou
book a roll containing the name of every male citizen livi
in the county who possessed the qualifications herein p
scribed and who is not exempted by law from serving
juries. The roll shall be arranged alphabetically and
precincts in their numerical order and the jury commiss
shall cause to be written on the roll opposite every na
placed thereon the occupation, residence and place of bu
ness of every person selected, and if the residence has
street number it must be given. Upon the completion
the roll the jury commission shall cause to be prepa
plain white cards all of the same size and texture and sh
have written or printed on the cards the name, occupati
place of residence and place of business of the person wh
name has been placed on the jury roll; writing or printi
but one person's name, occupation, place of residence a
of business on each card. These cards shall be placed i
substantial metal box provided with a lock and two ke
which box shall be kept in a safe or vault in the office
the probate judge, and if there be none in that office,
jury commission shall deposit it in any safe or vault in
court house to be designated on the minutes of the co
mission; and one of said keys thereof shall be kept by
president of the jury commission. The other of said k
shall be kept by a judge of a court of record having juri
other than the probate or circuit court, and in count
having no such court then by the judge of the circuit cou

for the sole use of the judges of the courts of said county presiding jurors. The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by anyone except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction.

§21. Qualifications of persons on jury roll.—The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgment; but no person must be selected who is under twenty-one or who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror; or cannot read English or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder his name may be placed on the jury roll and in the jury box. No person over the age of sixty-five years shall be required to serve on a jury or to remain on the panel of jurors unless he is willing to do so.